

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Petition of the Verizon Telephone Companies	)	
for Forbearance Under 47 U.S.C. § 160(c)	)	WC Docket No. 04-440
from Title II and Computer Inquiry Rules	)	
with Respect to Their Broadband Services	)	
	)	

**MOTION FOR EXPEDITED ORDER ON  
VERIZON PETITION FOR FORBEARANCE**

Covad Communications Group, NuVox Communications, Inc., and XO Communications, LLC, (hereinafter referred to jointly as “Movants”), through counsel and pursuant to 47 C.F.R. §1.41, hereby request that the Commission issue a written order addressing the Verizon Telephone Companies’ (“Verizon”) petition seeking forbearance from certain regulatory requirements applicable to its provision of broadband services.<sup>1</sup> The Movants urge the Commission to deny Verizon any regulatory forbearance for its broadband services on the ground that Verizon has not met the substantive statutory requirements.<sup>2</sup>

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<sup>1</sup> *Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, WC Docket No. 04-440 (filed Dec. 20, 2004) (“*Verizon Forbearance Petition*”).

<sup>2</sup> Should the Commission fail to deny Verizon’s petition, the Movants urge the Commission to expressly (via written order) limit its grant of forbearance to the particular types of broadband services and the Title II regulations specified by Verizon in its February 7, 2006 *ex parte* letter. Letter from Edward Shakin, Vice President & Associate General Counsel, Verizon, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 04-440 (filed Feb. 7, 2006) (“*February 7 Ex Parte*”). The broadband services specified by Verizon include Frame Relay Service, ATM Cell Relay Service, Internet Protocol – Virtual Private Network (IP-VPN) Service, Transparent LAN Service, LAN Extension Service, IntelliLight Broadband Transport, Custom Connect, Verizon

The Movants further request that the written order be issued prior to expiration of the statutory deadline for Commission action on pending “me-too” broadband forbearance petitions.<sup>3</sup> The Movants urge the Commission to refrain from compounding the difficulties that have resulted from the agency’s determination that the Verizon broadband forbearance petition was deemed granted by operation of law by issuing a formal order addressing the merits of the Verizon broadband forbearance petition prior to ruling on the pending “me-too” petitions filed by Qwest Corp., AT&T Inc., BellSouth Corp., Frontier and Citizens, and the Embarq local operating companies.<sup>4</sup>

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Optical Networking, Optical Hubbing Service, and IntelliLight Optical Transport Service. *See February 7 Ex Parte*, Attachment 1.

<sup>3</sup> *See Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect To Broadband Services*, WC Docket No. 06-125, (“*Qwest Forbearance Petition*”); *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II And Computer Inquiry with Respect to its Broadband Services*, WC Docket No. 06-125, (“*AT&T Forbearance Petition*”); *Petition of BellSouth Corporation for Forbearance Under 47 U.S.C. § 160(c) From Title II and Computer Inquiry Rules With Respect to its Broadband Services*, WC Docket No. 06-125 (“*BellSouth Forbearance Petition*”); *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements*, WC Docket No. 06-147 (*Embarq Forbearance Petition*”); *Petition of the Frontier and Citizens Incumbent Local Exchange Carriers for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, WC Docket No. 06-147, (“*Frontier Forbearance Petition*”).

<sup>4</sup> The Commission has extended the statutory deadline 90 days for each “me too” forbearance petition. *See Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect To Broadband Services*, WC Docket No. 06-125, Order (rel. Jun. 8, 2007); *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II And Computer Inquiry with Respect to its Broadband Services*, WC Docket No. 06-125, Order (rel. Jul. 6, 2007); *Petition of BellSouth Corporation for Forbearance Under 47 U.S.C. § 160(c) From Title II and Computer Inquiry Rules With Respect to its Broadband Services*, WC Docket No. 06-125, Order (rel. Jul. 6, 2007); *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements*, WC Docket No. 06-147, Order (rel. Jul. 20, 2007); *Petition of the Frontier and Citizens Incumbent Local Exchange Carriers for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, WC Docket No. 06-147, Order (rel. Jul. 20, 2007).

## I. BACKGROUND

On December 20, 2004, Verizon filed a petition seeking forbearance pursuant to Section 10 of the Communications Act of 1934, as amended (“Act”).<sup>5</sup> Verizon sought relief from Title II of the Act and the Commission’s *Computer Inquiry* rules<sup>6</sup> to the extent they imposed traditional common carrier regulations on Verizon’s broadband services. On December 19, 2005, the Commission extended the deadline for reaching a decision on Verizon’s petition 90 days, to March 19, 2006, as permitted by Section 10(c) of the Act. During that 90-day extension period, Verizon filed an *ex parte* letter clarifying and significantly narrowing the relief requested in its petition by specifying the services and regulations for which it sought forbearance.<sup>7</sup>

In contrast to the original petition, which requests in broad and sweeping terms that the Commission “forbear from applying Title II and the *Computer Inquiry* rules” “to any broadband services offered by Verizon,”<sup>8</sup> the *February 7 Ex Parte* narrows the relief

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<sup>5</sup> 47 U.S.C. § 160. Section 10(a) of the Act authorizes the Commission to “forbear from applying any regulation or any provision” of the Act if it determines that (1) enforcement is not necessary to ensure that the charges, practices, classifications, or regulations of a carrier are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement is not necessary for the protection of consumers; and (3) forbearance is consistent with the public interest. Section 10(c) provides that a petition for forbearance “shall be deemed granted” if the Commission does not deny the petition within one year of filing, unless the Commission extends the deadline by 90 days.

<sup>6</sup> See *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Final Decision and Order, 28 F.C.C.2d 267 (1971); *Amendment of Section 64.702 of the Commission’s Rules and Regulations*, Final Decision, 77 F.C.C.2d 384 (1980); *Computer III Further Remand Proceedings: Bell Operating Co. Provision of Enhanced Services*; 1998 Biennial Review – Review of Computer III and ONA Safeguards and Requirements, Report and Order, 14 FCC Rcd 4289 (1999) (collectively the “*Computer Inquiry*” rules).

<sup>7</sup> See *February 7 Ex Parte*.

<sup>8</sup> *Verizon Forbearance Petition*, at 1.

requested and discusses the types of broadband services and types of Title II regulations that apply to those services for which forbearance is requested. More specifically, Verizon sets out two main categories of services for which it seeks relief: (1) packet-switched services capable of 200 kbps in each direction (for example, frame relay, ATM, IP-VPN and Ethernet); and (2) non-TDM based optical networking, optical hubbing and optical transmission services that are transmission services provided over optical facilities at OCn speeds.<sup>9</sup> All of these services, Verizon writes, fall within the Commission's well-established "broadband" definition and exclude traditional TDM-based special access services.<sup>10</sup>

By March 20, 2006, the Commission had not issued a written ruling granting or denying the petition on the merits, and instead issued a News Release notifying the public that "the relief requested by Verizon's petition was deemed granted by operation of law, effective March 19, 2006."<sup>11</sup> The Commission also issued a Joint Statement from two Commissioners – Chairman Martin and Commissioner Tate – explaining that while none of the Commissioners supported granting Verizon the full relief sought in the petition as drafted, Chairman Martin and Commissioner Tate favored granting the petition as limited by Verizon's *February 7 Ex Parte*.<sup>12</sup> The other two Commissioners – Commissioner

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<sup>9</sup> *February 7 Ex Parte*, at 2-3.

<sup>10</sup> *Id.*, at 3.

<sup>11</sup> *Verizon Telephone Companies' Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to their Broadband Services Is Granted by Operation of Law*, Public Notice, WC Docket No. 04-440 (rel. Mar. 20, 2006) ("News Release").

<sup>12</sup> Joint Statement of Chairman Kevin J. Martin and Commissioner Deborah Taylor Tate, WC Docket No. 04-440 (rel. Mar. 20, 2006) ("*Joint Statement*").

Copps and Commissioner Adelstein – issued separate statements detailing their opposition to the Verizon petition, even as limited by the *February 7 Ex Parte*.<sup>13</sup>

Neither the *News Release*, the *Joint Statement*, nor the separate statements of Commissioners Copps and Adelstein disclosed that the Commission had voted on an order addressing the merits of Verizon’s petition. Chairman Martin later acknowledged, however, that the Commission had taken a formal vote on the matter.<sup>14</sup> Chairman Martin stated that “[t]he Commission . . . by a recorded 2-2 vote, neither granted or denied Verizon’s forbearance petition.”<sup>15</sup> Chairman Martin further stated that “[t]here still is no majority view on the appropriate outcome of Verizon’s petition” and that “because there was not (and is not today) a majority view . . . we were unable to take the preferred course of issuing an official written decision.”<sup>16</sup>

Over a dozen parties petitioned for review of the Commission’s disposition of the Verizon petition and those consolidated appeals are currently pending in the D.C. Circuit.<sup>17</sup> The petitioning parties are challenging whether the Commission’s announcement that the Verizon petition was “deemed granted” is contrary to law; whether the Commission erred in concluding that the “deemed grant” does not constitute

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<sup>13</sup> Statement of Commissioner Michael J. Copps in Response to Commission Inaction on Verizon Forbearance Petition, WC Docket No. 04-440 (rel. Mar. 20, 2006) (“*Copps Statement*”); Statement of Commissioner Jonathan S. Adelstein in Response to Commission Inaction on Verizon Forbearance Petition, WC Docket No. 04-440 (rel. Mar. 20, 2006) (“*Adelstein Statement*”). In March 2006, there were only four sitting commissioners.

<sup>14</sup> See Post Hearing Responses of Chairman Kevin J. Martin to Questions from the Nominations Hearing Held by the Senate Commerce Committee on September 12, 2006, at 21-22, attached as Supplemental Addendum 4-5 to Brief of Carrier Petitioners, *Sprint Nextel Corp. v. FCC*, Case No. 06-1111 (D.C. Cir.) (“*Sprint Nextel*”).

<sup>15</sup> *Id.*, at 22.

<sup>16</sup> *Id.*

<sup>17</sup> See *Sprint Nextel Corp. v. FCC*, Case No. 06-1111 (D.C. Cir.) (“*Sprint Nextel*”).

final agency action reviewable by the Court; whether the Commission engaged in reasoned decision-making as required by the Administrative Procedure Act (“APA”); and whether Verizon’s petition and supplemental pleadings meet the minimum statutory requirements for forbearance under Section 10.<sup>18</sup>

After the Commission announced that Verizon’s petition was deemed granted, a number of other incumbent local exchange carriers (“ILECs”) filed forbearance petitions seeking similar relief, relying on the “precedent” established in the Verizon forbearance proceeding.<sup>19</sup> Those carriers argue that because they are seeking relief identical to that Verizon received, the Commission has no discretion to deny or delay their requests, notwithstanding the fact that Verizon’s petition was granted by operation of law due to the Commission’s deadlocked 2-2 vote.<sup>20</sup>

In its petition, Verizon contends that the regulations imposed by Title II and the *Computer Inquiry* rules are not needed to ensure competitive prices in the broadband market because the existing competition in the broadband market ensures just and reasonable prices.<sup>21</sup> Further, Verizon proposes that the public will benefit from the more efficient competition that Verizon will provide against cable modem providers and long distance carriers.<sup>22</sup> At no point in its petition does Verizon explain or elaborate on what it means by “broadband services.” From the plain language of the petition, it seems that

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<sup>18</sup> See *Sprint Nextel*, Brief of Carrier Petitioners, at 2.

<sup>19</sup> See *Qwest Forbearance Petition*; *AT&T Forbearance Petition*; *BellSouth Forbearance Petition*; *Embarq Forbearance Petition*; *Frontier Forbearance Petition*.

<sup>20</sup> See, e.g., *Qwest Forbearance Petition*, at 2.

<sup>21</sup> *Id.*, at 16-19.

<sup>22</sup> *Id.*, at 19-20.

Verizon is requesting forbearance from the application of Title II and the *Computer Inquiry* rules to any and all broadband services.

In response to the Verizon petition and other ILEC broadband forbearance petitions, predictably, numerous parties filed comments in an attempt to convince the Commission that the broadband marketplace is not fully competitive, that the ILECs continue to have market power over the facilities used to serve consumers outside of the mass market, and that Verizon has powerful incentives to discriminate and engage in cost misallocation.<sup>23</sup> The opponents argued that if the Commission were to grant forbearance, the Commission would allow Verizon to curtail or eliminate competition by giving it the right to demand discriminatory rates and conditions for transmission service.<sup>24</sup>

Interested parties also maintained that Verizon's petition is too vague to adequately analyze its request on the merits. Not only does Verizon's petition fail to identify which specific statutory provisions in Title II it is requesting that the Commission forbear from applying, but also, the petition fails to define the services for which Verizon seeks relief or the specific geographic markets for which relief is sought.<sup>25</sup> Furthermore, the petition fails to provide any meaningful facts or analysis with respect to the impact that forbearance will have on specific services in specific geographic markets and any meaningful facts or analysis with respect to the impact that forbearance in the wholesale market will have on retail competition.<sup>26</sup>

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<sup>23</sup> See, e.g., Joint Comments of Time Warner Telecom, XO Communications, Lightship Telecom and Conversent Communications, WC Docket No. 04-440 (filed Feb. 8, 2006).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*, at 4-6.

<sup>26</sup> *Id.*

Moreover, the requests to deny the Verizon petition, echoing the requests to deny a similar petition filed by BellSouth in October 2004,<sup>27</sup> explained that Verizon's petition must be dismissed because it fails to satisfy the statutory standard for forbearance in Section 10 of the Act. First and foremost, Verizon's contention that competition exists in all segments of the broadband market, and that this competition will ensure just and reasonable prices, fails because it focuses only on the retail market and ignores the fact that Verizon retains market power in both the residential and the business markets.<sup>28</sup> At a minimum, the opponents of Verizon point out, Verizon shares market power with the cable companies in the residential broadband market. In the business market, cable companies provide such nominal competition that the ILECs retain exclusive power in that market.<sup>29</sup> Further, Verizon fails to demonstrate how forbearance will benefit consumers or be consistent with the public interest.<sup>30</sup>

## II. THE COMMISSION HAS AUTHORITY TO ISSUE AN ORDER ADDRESSING THE MERITS OF VERIZON'S BROADBAND FORBEARANCE PETITION

### A. The Statutory "Deemed Grant" of Verizon's Forbearance Petition Does Not Create a Jurisdictional Limitation on the Commission's

<sup>27</sup> See *Petition of BellSouth Telecommunications, Inc. for Forbearance under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Title II Common Carriage Requirements*, WC Docket No. 04-405 (filed Oct. 27, 2004) ("*BellSouth Petition*").

<sup>28</sup> *Earthlink Opposition*, at 11-12.

<sup>29</sup> See, e.g., *Opposition of CloseCall America, Inc., CTC Communications Corp., FDN Communications, Inc., Gilette Global Networks, Inc. d/b/a Eureka Networks, Pac-West Telecomm, Inc., and TDS Metrocom, LLC*, WC Docket No. 04-440 (filed Feb. 8, 2006) ("*FDN Opposition*"), at 3-14.

<sup>30</sup> Opponents of Verizon's petition also indicated that Verizon's requested relief would impede broadband investment. They stated that (1) the deployment of VoIP alone will drive broadband investment; and (2) elimination of Title II regulations will impede the development of broadband in rural areas where various factors make broadband costly to deploy. See, e.g., *FDN Opposition*, at 16-19.



### **Authority to Subsequently Rule on the Petition After the Deadline Has Passed**

Section 10 of the Act requires the Commission to act on a forbearance petition within the statutory deadline or the petition will be deemed granted by operation of law. A “deemed grant,” however, in no way precludes or limits the subsequent issuance of an official order addressing the merits of the petition.<sup>31</sup> While Section 10 does not speak directly to the Commission’s jurisdiction to act after the statutory deadline for ruling on a forbearance petition has passed, the principle that the Commission can issue a written decision after the statutory deadline has been well-supported judicially. Indeed, the Commission itself has embraced this position.

The Commission has acknowledged that failure to issue a formal written order by the statutory deadline for forbearance petitions does not preclude it from reexamining a forbearance determination in response to a petition for reconsideration.<sup>32</sup> Additionally, the Commission has recognized that a court could issue a mandamus ruling to compel Commission action even after the statutory forbearance deadline had passed.<sup>33</sup> Further, the Commission has clearly endorsed an interpretation of Section 10 in which it retains authority after the statutory deadline to act on the merits of a petition as being both reasonable and consistent with the public interest.<sup>34</sup>

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<sup>31</sup> Indeed, Section 10(c) requires the Commission to “explain its decision” “to grant or deny a petition in whole or in part . . . in writing”. 47 U.S.C. § 160(c).

<sup>32</sup> *Qwest Corp. v. FCC*, 482 F.3d 471, 477 (D.C. Cir. 2007).

<sup>33</sup> *Qwest Corp. v. FCC*, Brief for Respondents, at 25. The D.C. Circuit agrees with the Commission. In *Qwest Corp. v. FCC*, the D.C. Circuit noted the Commission’s ability to consider a petition for reconsideration, but “with the potential of a mandamus action hovering in the background.” *Id.*, at 477.

<sup>34</sup> *Core Communications Inc. v. FCC*, 455 F.3d 267 (D.C. Cir. 2006), Brief for Respondents, at 31-33 (“*Core Communications*”) (the Commission issued a Public Notice announcing a partial denial of forbearance by the statutory deadline but did not release the text of its decision until ten days later).

Most importantly, the Commission has argued that the forbearance provision does not prohibit it from acting after a forbearance petition has been deemed granted by operation of law. Before the D.C. Circuit in *Core Communications v. FCC*, the Commission argued that “[t]he language of section 160(c) does not unambiguously provide that the Commission is disabled from acting on a forbearance petition if it fails to release a denial order by the statutory deadline.”<sup>35</sup> While the D.C. Circuit did not reach this issue in its decision, the Commission’s position articulates the judicial consensus on this issue. Without explicit direction from Congress, the courts have been reluctant to interpret a statutory deadline as a jurisdictional limitation on subsequent agency action, even where the statute provides for automatic grant of requested relief upon lapse of the deadline.

Notably, this issue has also been raised in the context of the Commission’s authority under Section 204 of the Act, which is structurally similar to Section 10. Section 204(a) authorizes the Commission to conduct a proceeding regarding the lawfulness of a carrier’s new or revised charges or practices.<sup>36</sup> Section 204(a)(2)(A) requires the Commission to issue an order concluding such proceedings within five months. If the Commission fails to complete its analysis and issue a ruling by the five-month statutory deadline, the charge or practice will be deemed granted or lawful. In *SWBT v. FCC*, the Eighth Circuit upheld a Commission decision adopted nine years after that statutory deadline had passed, wherein the Commission ordered SWBT to pay refunds for certain services provided during that nine-year period.<sup>37</sup> The Court ruled that

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<sup>35</sup> *Core Communications*, Brief for Respondents, at 31.

<sup>36</sup> 47 U.S.C. § 204(a).

<sup>37</sup> *SWBT v. FCC*, 138 F.3d 746 (8<sup>th</sup> Cir. 1998).

the five-month decision-making time constraint imposed by Section 204(a)(2)(A) did not operate as a statute of limitations and therefore did not end the Commission's authority to act.<sup>38</sup> Without a direct statutory prohibition, the mere passing of a deadline without an agency decision does not foreclose subsequent action by the agency.<sup>39</sup>

More generally, in *Brock v. Pierce County*, the Supreme Court refused to conclude "that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake."<sup>40</sup> When less drastic remedies are available, courts should not assume that Congress intended the agency to lose its power to act after the passing of a statutory deadline,<sup>41</sup> and the Commission itself has characterized the "deemed grant" of a forbearance petition as a "radical remedy" to be avoided.<sup>42</sup> The Supreme Court has "frequently articulated the 'great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided.'"<sup>43</sup>

Section 10 requires that the Commission review a forbearance petition in light of the public interests involved to ensure that competition and consumers are protected and

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<sup>38</sup> *Id.*, at 749.

<sup>39</sup> *Id.*

<sup>40</sup> *Brock v. Pierce County*, 476 U.S. 253, 260 (1986) ("*Brock*").

<sup>41</sup> *Id.*

<sup>42</sup> *Qwest v. FCC*, Brief for Respondents, at 25. Indeed, Commissioners Copps and Adelstein found the "deemed granted" result so objectionable that they have suggested they would approve a formal order granting forbearance that they would otherwise oppose in order to avoid another "deemed grant" by operation of law. See *Fones4All Corp. Petition for Expedited Forbearance*, Concurring Statement of Commissioner Copps, 21 FCC Rcd 11125 (2006).

<sup>43</sup> *Brock*, 476 U.S. at 260.

promoted. The Commission has failed to protect and promote the public interest with respect to the Verizon broadband forbearance petition by failing to issue a formal written decision. The Commission can right this situation, however, by expeditiously issuing a ruling on the merits of Verizon’s petition. The Movants urge the Commission to do so, and to deny Verizon any regulatory relief for its broadband services on the ground that Verizon has not met the substantive requirements of Section 10. At a minimum, the Commission should expressly limit the grant of forbearance to the particular types of broadband services and the Title II regulations specified by Verizon in its *February 7 Ex Parte*.

**B. Revisiting Verizon’s “Deemed Grant” Is Consistent With The Provisions of Section 10**

In *Core Communications*, the Commission concluded that “section 160(c) provides for an interim ‘deemed’ grant of a forbearance petition that the Commission fails to deny within the statutory deadline, but that the agency retains the authority thereafter to deny or grant the petition in whole or in part, and to ‘explain its decision in writing.’”<sup>44</sup> This is exactly the relief requested here. As the Commission is aware, its interpretations of the Communications Act generally, and of Section 160 in particular, are governed by *Chevron* principles.<sup>45</sup> Under *Chevron*, if “Congress has directly spoken to the precise question at issue,” the court “must give effect to the unambiguously expressed intent of Congress” but “if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible

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<sup>44</sup> *Core Communications*, Brief for Respondents, at 31.

<sup>45</sup> *Chevron U.S.A. Inc. v. Natural Res. Def Council, Inc.*, 467 U.S. 837 (1984).

construction of the statute.”<sup>46</sup> These principles apply not only to the substantive aspects of the statute but also to the procedural aspects, including whether the statute provides an agency with authority to act.<sup>47</sup> Thus, although Section 10 does not specify that the deemed grant of a forbearance petition may only apply in the interim and that the Commission retains authority to issue a subsequent written ruling on the merits, such an interpretation is reasonable and would be upheld under a *Chevron* review.<sup>48</sup>

### III. THE COMMISSION SHOULD EXPEDITIOUSLY ISSUE AN ORDER ADDRESSING THE MERITS OF VERIZON’S PETITION TO ELIMINATE ANY NEGATIVE SPILLOVER FROM THE “DEEMED GRANT”

#### A. The Public Interest Demands a Thorough Review Of and Definitive Decision On the Merits Of the Verizon Petition

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<sup>46</sup> *Id.* at 842-43. *See also National Cable & Telecommunications Association v. Brand X Internet Services*, 125 S.Ct. 2688, at 2699 (under *Chevron*, “ambiguities in statutes within an agency’s jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion.”).

<sup>47</sup> *Core Communications*, Brief for Respondents, at n. 14 (citing *Columbia Gas Transmission Corp. v. FERC*, 404 F.3d 459, 461 (D.C. Cir. 2005) (observing that “the deferential interpretive canon announced in *Chevron* \* \* \* applies to our review of FERC’s construction of the [Natural Gas Act’s] jurisdictional provisions”); *Bullcreek v. Nuclear Regulatory Comm’n*, 359 F.3d 536, 540-41 (D.C. Cir. 2004) (“The Court typically defers \* \* \* to an agency’s interpretation of its own jurisdiction under a statute that it implements.”); *Oklahoma Natural Gas Co. v. FERC*, 28 F.3d 1281, 1283-84 (D.C. Cir. 1994) (expressly following the “Supreme Court[’s] \* \* \* practice [of] defer[ring] even on jurisdictional issues” (citations omitted))).

<sup>48</sup> Further, the Commission has recognized that Section 10 grants it authority to act on its own. *See Qwest v. FCC*, Brief for Respondents, at 4. It may *sua sponte* open a forbearance proceeding or reopen a forbearance proceeding absent a request to do so. Because Section 10(a) requires the Commission to determine that forbearance will not harm consumers or conflict with the public interest, a necessary corollary to this requirement is that the Commission also is obligated to cease such forbearance if any one of those conditions is no longer satisfied. Thus, the Commission may decide at any time to reinstate and enforce such rules that it formerly forbore from applying to the affected party or parties.

The Commission is charged with protecting competition and consumers by ensuring carriers' "charge[s], classification[s], regulation[s] or practice[s]" are just and reasonable, and prescribing rules as are necessary in the public interest.<sup>49</sup> Congress intended for forbearance from the Commission's rules to be granted only after thorough review and a Commission finding that the statutory requirements of Section 10(a) are satisfied. Congress provided the Commission with a full year to conduct such a proceeding and permitted an additional 90-day extension, if necessary. Congress clearly expected that 15 months would be adequate time for the Commission to thoroughly review a forbearance petition in light of the statutory requirements. To protect petitioners from unreasonable delay, however, Congress included a drastic consequence for the Commission's failure to issue a decision within the statutory timeframe: it directed that forbearance petitions still pending after the statutory deadline be deemed granted by operation of law.

It is highly unlikely that Congress intended for forbearance petitions to be ubiquitously granted through the operation of law in Section 10(c) rather than through reasoned analysis of the requirements of Section 10(a). The purpose of the "deemed granted" provision was to counteract perceived delays in other proceedings by ensuring that the Commission did not engage in unnecessary delay in concluding its analysis and issuing a formal ruling.<sup>50</sup> However well-meaning Congress's inclusion of the "deemed grant" directive, however, it has created a convoluted result here. The precise scope of

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<sup>49</sup> 47 U.S.C. §§ 151, 201.

<sup>50</sup> *See, e.g., Core Communications*, Brief for Respondents, at 32 ("[I]t is at least plausible that Congress viewed the deadline and the "deemed granted" provision simply as mechanisms to force timely action by the Commission, and not as a process for wholesale revision of the Act through inaction.").

the forbearance granted to Verizon and the rationale underlying that regulatory relief is uncertain, and yet other ILECs have chosen to rely on the relief Verizon extracted by operation of law to justify their own requests for forbearance, seeking to circumvent a reasoned review by the Commission on the merits of their petitions.

The Commission must not let this unfortunate state of affairs continue to snowball through the pending broadband forbearance proceedings. To prevent this, the Commission should expeditiously issue a written order in the Verizon proceeding and should conclude that forbearance was not and is not warranted under Section 10(a).<sup>51</sup> The Commission has readily acknowledged that Congress has “left a gap for the agency to fill,”<sup>52</sup> and the Commission must not shirk its responsibility to fill that gap.

**B. The Commission Needs to Provide a Written Record Of Its Decision-Making Process**

1. Definitive action by the Commission through issuance of an order would unquestionably provide the opportunity for judicial review

While Movants disagree with the Commission’s position that judicial review is precluded when a forbearance petition is “deemed granted” by operation of Section 10(c),<sup>53</sup> there is no question that definitive action by the Commission through the release of an order addressing the merits of the Verizon petition would provide the opportunity for appellate review. The Commission’s adoption and release of a written ruling with a reasoned explanation of its findings would provide for much needed clarity and

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<sup>51</sup> Should the Commission fail to deny Verizon’s petition, the Commission should expressly limit the grant of forbearance to the particular types of broadband services and the Title II regulations specified by Verizon in its *February 7 Ex Parte*.

<sup>52</sup> See *Core Communications*, Brief for Respondents, at 30 (citing *Chevron*, 467 U.S. at 843).

<sup>53</sup> See *Sprint Nextel*, Brief for Respondent FCC, at 9.

uncontested appellate review, which is both appropriate and necessary to ensure the agency is properly administering the statute.

As it stands now, a central debate in the appellate briefs filed in the D.C. Circuit in the current Verizon broadband forbearance petition appeal focuses on whether the Commission's "deemed grant" is subject to appellate review. It is unfair and inappropriate for the Commission to fail to render a substantive written ruling and later claim that such failure is beyond appellate review when such failure operated to rescind vital statutory provisions and Commission rules that were themselves adopted after lengthy debate and consideration. The Commission should properly give the forbearance process the same level of consideration and explanation on the record as it gave to the initial adoption of the rules themselves.

2. Publication of a detailed order is necessary to alleviate current confusion over what relief was granted to Verizon by operation of law and to specify which rules, if any, the Commission may forbear from applying to Verizon

Section 552 of the APA requires the Commission to publish the text of its substantive rules, including any amendment, revision, or repeal thereto.<sup>54</sup> While the statutory "deemed grant" of Verizon's petition may not strictly invoke this requirement, certainly the rationale behind the requirement holds true. Namely, publication of the Commission's substantive regulations is necessary "for the guidance of the public" and to provide timely notice to all affected parties regarding the requirements to which they will be subjected. The APA goes so far as to prohibit enforcement of an unpublished rule where the affected party has no actual notice, indicating how strongly Congress

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<sup>54</sup> 5 U.S.C. § 552(a)(1)(D) & (E).



considered this requirement.<sup>55</sup> In this case, there is no basis to conclude that affected parties have either actual or constructive notice of what rules or standards the Commission intends to follow when considering subsequent requests for forbearance from the same or similar regulatory requirements as those from which Verizon gained some level of deregulation for its broadband services by operation of law because the Commission has not provided any written detail regarding its disposition of Verizon's petition, published or otherwise.

Thus, although it may be debatable whether the Commission is legally obligated to comply with Section 552 in this circumstance, it should do so as a matter of public policy. Because of the many supporting documents filed by Verizon subsequent to its initial petition, including, importantly, the *February 7 Ex Parte* purporting to limit the regulatory relief being sought,<sup>56</sup> there is a great deal of confusion regarding exactly what relief has been "deemed granted" to Verizon. Even BellSouth in its "me-too" broadband forbearance petition agrees that "[i]n the absence of an explicit order, some uncertainty exists as to the exact scope of relief flowing from the Verizon petition."<sup>57</sup> Adoption and release by the Commission of a written ruling detailing what, if any, forbearance is justified by Verizon's petition is necessary to alleviate that confusion.

3. A reasoned explanation ensures rationality and accountability in the Commission's decisions as well as providing clear precedent to guide future proceedings

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<sup>55</sup> 5 U.S.C. § 552(a) ("Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published.")

<sup>56</sup> See n.2, *supra*.

<sup>57</sup> *BellSouth Petition for Forbearance*, at 3.

Section 10(c) requires that the Commission provide a written explanation of its decision regarding a forbearance petition.<sup>58</sup> While Section 553 of the APA – requiring a concise statement of the basis and purpose of adopted rules – may not strictly apply to the conduct of forbearance proceedings and the Commission’s obligation under Section 10(c) to provide a written explanation of its disposition of forbearance petitions, the policies underlying Section 553 are applicable in forbearance proceedings.<sup>59</sup> It is well-settled that the intent of the statement required by Section 553 is to “enable [a reviewing] court to see what major issues of policy were ventilated by informal proceedings and why the agency reacted as it did.”<sup>60</sup> This assists judicial review and enables fair treatment of persons affected by the rule.<sup>61</sup> In its explanation, an agency should rebut vital relevant comments and enunciate the basis and rationale of its action to enable a reviewing court to see objections and to determine why the agency reacted to them as it did.<sup>62</sup> By doing so, the court may ensure that the agency’s action was not arbitrary and capricious.<sup>63</sup>

In this case, the Commission has provided no reasoned review of Verizon’s petition, its subsequent clarifying *February 7 Ex Parte*, or any of the objections made by parties on the record. Although the Commission claims that it “did not render any decision on Verizon’s forbearance petition,”<sup>64</sup> the ILECs that have filed “me-too” broadband forbearance petitions have taken silence by the Commission as acceptance of

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<sup>58</sup> 47 U.S.C. § 160(c).

<sup>59</sup> 5 U.S.C. § 553(c).

<sup>60</sup> *Automotive Parts & Accessories Assoc. v Boyd*, 407 F.2d 330 (D.C. Cir. 1968).

<sup>61</sup> *Home Box Office, Inc. v FCC*, 567 F.2d 9, (D.C. Cir. 1977), *cert. denied*, 434 U.S. 988 (1977).

<sup>62</sup> *Lloyd Noland Hospital & Clinic v Heckler*, 762 F.2d 1561 (11<sup>th</sup> Cir. 1985).

<sup>63</sup> *Natural Resources Defense Council, Inc. v SEC*, 389 F. Supp. 689 (D.D.C. 1974).

<sup>64</sup> *Sprint Nextel*, Brief for Respondent FCC, at 9.

Verizon's position in its totality. The draft order approved by Chairman Martin and Commissioner Tate did not embrace all of Verizon's claims, however, and in fact would have denied a portion of Verizon's petition. Therefore, allowing the "deemed grant" to remain the "law of the land" when not one of the residing commissioners would have approved Verizon's petition in full is a gross misappropriation of justice and severely undermines the integrity of the Commission's decision-making processes. In order to maintain the integrity of its decision-making processes, the Commission must issue a reasoned written decision addressing the merits of the regulatory relief requested by Verizon.

**C. Issuance of a Written Order Addressing the Merits Of Verizon's Forbearance Petition Is Essential**

As explained above, due to the vacant commissioner seat at the time, the Commission was unable to break the deadlocked 2-2 split when the statutory deadline for disposition of Verizon's petition lapsed. Since that time, however, Commissioner McDowell has joined the Commission. Commissioner McDowell recently reached the end of his recusal period and now may vote in these proceedings. With a full complement of commissioners, now is the ideal time to address the Verizon broadband forbearance petition and to issue a definitive decision on the merits.

Because of the looming statutory deadlines on the pending "me-too" broadband forbearance petitions, time is of the essence here. The Commission should expeditiously adopt and issue an order on the merits of Verizon's broadband forbearance petition to prevent the "deemed grant" to act as legal precedent in the pending "me-too" proceedings. As discussed above, those ILEC petitioners seek the same forbearance as that granted to Verizon by operation of law, claiming that forbearance is justified in order

to prevent discrimination in treatment among carriers.<sup>65</sup> Qwest even argues that grant of its broadband forbearance petition is merely a “ministerial act” that the Commission has no discretion to deny.<sup>66</sup> The Commission must not let its power be so summarily undermined. It should immediately adopt and release a substantive ruling on the Verizon petition in accordance with the requirements of Section 10(a). The Commission should expeditiously rule on the merits of each of those forbearance petitions to determine whether they satisfy Section 10(a) only after it has released a formal order in the Verizon forbearance proceeding.

#### IV. CONCLUSION

For all of the foregoing reasons, Movants urge the Commission to expeditiously adopt and issue a written order addressing the merits of the Verizon broadband forbearance petition in accordance with Section 10(a) of the Act. The Commission should deny Verizon any regulatory relief for its broadband services on the ground that Verizon has not met the substantive requirements of Section 10.<sup>67</sup> Further, the Commission should expeditiously rule on the merits of the “me too” broadband

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<sup>65</sup> See, e.g., *Qwest Forbearance Petition*, at 7-10.

<sup>66</sup> *Qwest Forbearance Petition*, at 2.

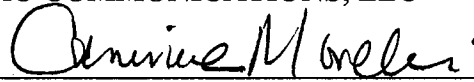
<sup>67</sup> If the Commission fails to deny the petition, it should expressly limit the grant of forbearance to the particular types of broadband services and the Title II regulations specified by Verizon in its *February 7 Ex Parte*.

forbearance petitions only after it has released a written decision in the Verizon  
forbearance proceeding.

Respectively Submitted,

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July 25, 2007

**CERTIFICATE OF SERVICE**

I, Susan Ray, hereby certify on this 25<sup>th</sup> day of July 2007, that copies of the foregoing Motion for Expedited Order on Verizon Petition for Forbearance were served via first-class mail, postage prepaid, on the following:

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